Supreme Court, U.S.
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JOSEPH F. SPANIOL, JR.
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No. 89-782

# IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1989

**FREDERICK SMITH**, in his individual and official capacity as Principal Bradford Area High School; **RICHARD MILLER**, in his individual and official capacity as assistant principal of the Bradford High School; and **FREDERICK SHUEY**, in his individual and official capacity as Superintendent of the Bradford Area School District

*Petitioners*

**vs**

JUDY GROVE SOWERS

*Respondent*

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

## REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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## *I. Introduction*

Sowers attempts to defeat Supreme Court review of this important case by overstating the facts so egregiously that it appears there are factual issues that require resolution at the trial court. However, Smith, Miller and Shuey will not engage in a debate with Sowers as to the facts of the case, other than to point out that even under the facts she alleges, important issues of law exist in this case which merit Supreme Court review.

## *II. The Holding of the Court Below Regarding the Alleged "Duty to Protect" Is Not Mere Dicta*

Sowers attempts to dismiss the Third Circuit's discussion of the original "duty to protect" theory as mere "dicta" which need not be reviewed by this Court. They claim that Smith, Miller and Shuey's argument that they are exposed to potential liability at trial on that theory is somehow "premature," Respondent's Brief at p. 12. But this argument completely misapprehends the nature of qualified immunity.

Qualified immunity is an immunity *from suit* or, as this Court has described it, an "entitlement not to stand trial or face the other burdens of litigation . . .." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). If the defendants are exposed to trial, the immunity has been wholly lost. Even if the trial court elects not to charge the jury that these men could be found liable for failing to protect Sowers, the fact that they have been subjected to the trial at all results in

the complete loss of their immunity. If they are properly immune, as they claim, they are entitled to avoid going to trial.

It must be remembered that the Third Circuit has affirmed the order of the district court holding that a duty to protect high school students from sexual abuse of teachers was clearly established in 1979, and which grounded this duty to protect on the substantive due process component of the 14th amendment. The prospect of trial based upon this law of the case is not a distant, speculative possibility; unless the district court's order is reversed, trial on this theory is a certainty.

Since the Third Circuit's holding leaves the "duty to protect" theory open and viable for prosecution at trial, it completely and effectively deprives Smith, Miller and Shuey of their right not to face trial on the "duty to protect" theory. Holdings which deprive litigants of rights are not mere dicta; they are holdings subject to review by higher courts. Smith, Miller and Shuey respectfully request that this Honorable Court review this implicit but effective holding of the Third Circuit.

*III. Edward Wright Was Not a State Actor*

In their principal brief, Smith, Miller and Shuey point out that this Court's decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. , 109 S.Ct. 998 (1989) establishes that they owed no duty under the U.S. Constitution to protect Sowers from sexual as-

saults by Edward Wright. Sowers attempts to distinguish *DeShaney* in an effort to avoid this inescapable conclusion. However, her attempt to distinguish *DeShaney* fails.

On page 13 of her brief, she claims without supporting argument of any sort that Wright was a state actor, while Randy DeShaney was not. This is simply not true. When Edward Wright allegedly attacked Judy Grove Sowers in his home that Saturday afternoon, he was not acting in his capacity as a band director or a teacher. Judy Grove, then between her junior and senior years of high school, could not possibly have believed that the attack was meant as part of her musical training or education, or was authorized by any school official. If the assault in fact took place, Edward Wright acted out of his personal sexual desires, not out of any attempt to fulfill his duties as a music instructor. In no sense of the word was the alleged attack "state action."

The "state action" requirement for Fourteenth Amendment cases, of course, has been frequently debated and discussed by the courts and commentators. One of the most complete and most recent discussions of the "state action" requirement can be found in the case of *Blum v. Yaretsky*, 457 U.S. 991, 102 S.Ct. 2777, 73 L.Ed.2d 534 (1982). In discussing whether patient transfers by a state-regulated nursing home constituted "state action," the Court enunciated a three-step analysis as to when state action can be found.

> The complaining party must . . . show that

"there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself." [citation omitted] The purpose of this requirement is to assure that constitutional standards are invoked only when it can be said that the State is responsible for the specific conduct of which the plaintiff complains. The importance of this assurance is evident when, as in this case, the complaining party seeks to hold the State liable for the actions of private parties.

Second, although the factual setting of each case will be significant, our precedents indicate that a State normally can be held responsible for a private decision only when it has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State. [citations omitted] Mere approval of or acquiescence in the initiatives of a private party is not sufficient to justify holding the State responsible for those initiatives under the terms of the Fourteenth Amendment. [citations omitted]

Third, the required nexus may be present if the private entity has exercised

> powers that are "traditionally the exclusive prerogative of the State." [citations omitted]

*Id.*, 457 U.S. at 1004-1005.

The United States Court of Appeals for the Fourth Circuit has very recently applied this three-step analysis in a § 1983 claim very similar to *DeShaney* and which also bears some resemblance to this case. In *Milburn v. Anne Arundel County Department of Social Services*, 871 F.2d 474 (4th Cir. 1989), *cert. denied* 1989 U.S. LEXIS 4189 (1989) the Court was faced with a *DeShaney*-type complaint that a county children's services agency had failed to protect a child from abusive parents. However, unlike *DeShaney*, the abusive parents in *Milburn* were foster parents selected by the County after the child had been placed in the County's custody. Nevertheless, the Court found that the foster parents were not state actors, relying upon the Supreme Court's three-step analysis set forth in *Blum, supra*.

Likewise, applying the *Blum* analysis in this case, it is readily apparent that Wright is not a state actor. First, there is absolutely no nexus between the Bradford Area School District or its administrators and Wright's alleged gratification of his sexual desires; his actions may therefore not be treated as those of the District. It cannot be said in this case that the District is responsible for Wright's alleged sexual misconduct.

Second, it cannot be said that the District or its administrators exercised coercive power or has provided such significant encouragement to Wright, either overt or

covert, that his decision to sexually molest Sowers must in law be deemed to be that of the District. Even the alleged approval of or acquiescence in Wright's conduct is not sufficient, under *Blum*, to justify holding the District responsible for those initiatives.

Third, sexual abuse of students is not traditionally the exclusive prerogative of the State. To even suggest, as Sowers does, that such criminal conduct can be attributed to the State in any fashion is absurd.

In *Blum*, there is a far stronger argument for a finding of state action than in this case. There, the actions complained of by plaintiffs occurred as a direct result of the implementation of nursing home regulations by the State of New York, and the State of New York received a direct benefit from the implementation of those regulations in the form of reduced cost to the state for nursing care. In the case at bar, the School District and its administrators did nothing to compel or coerce Wright to act as he did, and received absolutely no conceivable benefit from Wright's actions. If the Supreme Court can find no state action in *Blum, a fortiori* there can be no state action in this case.

### *IV. Sowers Has Not Truly Alleged Active Conduct*

The second way in which Sowers attempts to distinguish *DeShaney* is in the nature of the conduct of the state officials against whom liability is sought. Sowers claims on page 13-14 of her brief that the public officials in *DeShaney* were guilty merely of "passive inaction," while she claims

Smith, Miller and Shuey "actively concealed" abuse and "actively intimidated" students who complained. Aside from the fact that the record does not support such outrageous allegations, Sowers is merely playing semantic games.

Even if Smith, Miller and Shuey "concealed" allegations of sexual abuse of students and "intimidated" students who made complaints, it does not follow that they are responsible for the sexual abuse which took place before the alleged concealment or intimidation. Any "concealment" which occurred subsequent to the alleged assault on Sowers could not have anything to do with that assault. There is nothing in the record to support any claim that Wright knew of any allegations of sexual abuse by any teacher other than himself; indeed, if Smith, Miller and Shuey concealed such allegations it is unlikely that he would have such knowledge. Thus, whether any such allegations were made prior to his alleged attack on Sowers, the concealment of those allegations played no part in motivating him to assault Sowers. There is absolutely no connection between the alleged conduct of Smith, Miller and Shuey and the alleged injury to Sowers.

Sowers' Brief in Opposition to Petition for Writ of Certiorari goes on at length regarding alleged assaults on students other than Sowers and by actors other than Wright. Very little is said of Wright's alleged assault on Sowers other than Sowers' self-serving statement that her consumption of alcoholic beverages prior to traveling uninvited to Wright's private home is of "no relevance." (Sowers Brief p. 4, footnote 5). There is absolutely nothing

in the record to so much as suggest that any conduct of Smith, Miller and Shuey vis-a-vis these other teachers and students caused Wright to decide to assault Grove at his home during that summer vacation. Nor is there anything in the record that demonstrates that Wright had assaulted any Bradford Area student prior to June 16, 1989 or that Smith, Miller or Shuey were even informed of the alleged assault on Sowers until months after it had occurred. Sowers defies logic to suggest that her complaint established a duty on the part of Smith, Miller and Shuey to protect her from Wright's alleged assault. To the contrary, what is clear is that there is no allegation of any assault on Sowers by Wright subsequent to the time that the June 16, 1979 incident was made known to Smith, Miller and Shuey.

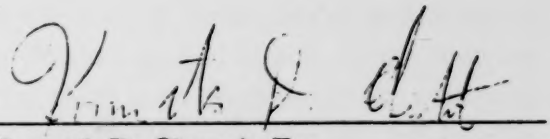
Smith, Miller and Shuey did not possess a crystal ball with which they could predict unknowable future events. Yet, the ability to forecast random future events would have been necessary for Smith, Miller and Shuey to have fulfilled the "duty" which Sowers has claimed. The incident of June 16, 1989 was the first allegation of misconduct by Wright reported to Smith, Miller and Shuey. Even if it is assumed that they did not properly respond to this report, these subsequent actions could not be said to have caused the assault.

In truth, the most that can be said of the alleged conduct of Smith, Miller and Shuey, even if all of the allegations made are believed, is that they failed to prevent Wright from committing the single isolated assault on Grove. Characterizing this passive conduct by using the

adverb "active" does not make the conduct active. Smith, Miller and Shuey's conduct in failing to prevent Wright's assault is no more "active" misconduct than the failure of the Winnebago County Children's Services officers to prevent Randy DeShaney's assault on his son.

## *V. Conclusion*

Petitioners pray that a Writ of Certiorari issue from this Honorable Court to review the judgment of the United States Court of Appeals for the Third Circuit in this action. In the event that the Petition is granted, Petitioners pray that the judgment of the Court below be reversed, that the cause be remanded, and that the Court below be directed to dismiss Petitioners as defendants, as prayed for in the Petition.



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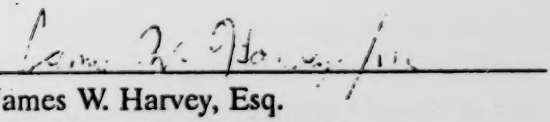

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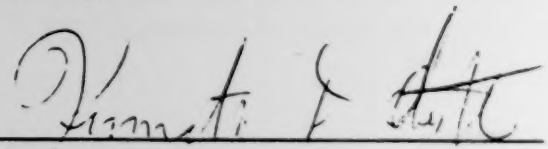
## *VI. Certification of Membership*

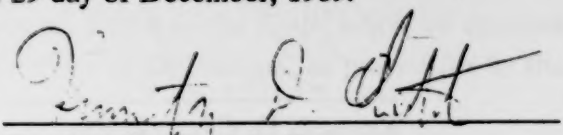
It is hereby certified that both of the Attorneys for the Petitioners are members of the Bar of the Supreme Court of the United States.



Kenneth D. Chestek, Esq.

*VII. Proof of Service*

I hereby certify that three copies of the within Petition for Writ of Certiorari were served on Wallace J. Knox and Sean J. McLaughlin, Esq., 120 West 10th Street, Erie, PA 16501, this 29 day of December, 1989.



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